United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: July 24, 1997

CASE NO. 94 INA 630

In the Matter of:

DR. PATRICIO A. TOLENTINO,
Employer

on behalf of

MARIA C. PABLO,
Alien

Appearance: Jack Golan, Esq., of Los Angeles, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for alien labor certification on behalf of Maria Pablo (Alien), by Dr. Patricio Tolentino (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

at the place where the alien is to perform the work: (1) there are not sufficient workers in the United'States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

The Employer has filed an application (ETA 750A) to permit the permanent employment of the Alien as a Dental Assistant to perform the following duties:

> Under the supervision of a Licensed Dentist, will: Assist Dentist with practice and treatment of patients such as cleaning filling, X-rays, root canals, extractions, porcelain caps & crowns, etc.; He/she will: Take preliminary information from patients to create & record patient's dental history; Prepare patients for X-rays: Prepare and sterilize instruments; Set-up trays & prepare amalgam & composite; impressions, root canal fillings; Take and pour impressions; Clean dentures, crowns and bridges as needed; Assist dentist in management of dental emergencies: Assist patients in filling of insurance forms; Perform office procedures such as appointment control, billing for services, filing of records, maintaining supply order; Give instructions on oral hygiene, dental procedures and treatments to patients as needed in English and Tagalog.

Eight applicants were referred to the Employer by the California Employment Development Department (EDD) on January 21, 1993. In a Statement of Recruitment Efforts, filed on March 3, 1993, the Employer reported that all applicants had been rejected for various reasons. In regard to applicant Cecilia B. Taylor de Borja, the Employer stated:

> Cecilia B. Taylor de Borja is not available for the offered position. We invited her to a personal interview (Ps. See copy of our letter with mailing receipts) Mrs. Borja did not come to the scheduled appointment. We contacted her by telephone and re-scheduled her to an interview on March 1, 1993. Again, Mrs. Borja did not come nor did she call us to cancel. We therefore conclude that she is not interested in the job.

A copy of a letter from the Employer to Ms. Taylor de Borja, dated February 9, 1993, was included with the recruitment report.

---

[2]This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 CFR § 656.27(c).

The letter invited her to attend an interview on February 22, 1993. A Receipt for Certified Mail shows that the letter was posted on February 9, 1993 and a Domestic Return Receipt shows that it was received by or on behalf of Ms. Taylor de Borja on February 11, 1993. A telephone number included in Ms. Taylor de Borja's resume shows the same area code as is listed for the Employer in the ETA 750A.

In answering a followup questionnaire Ms. Taylor de Borja advised EDD that she was contacted by the Employer by mail, but had gotten a job before she received the letter stating the date for an interview. Responses to similar questionnaires by three other applicants indicate that they were contacted by phone or both phone and mail.

The record reflects that upon receipt of the file from the EDD, the CO returned the case with the following instructions:

> You have coded this position DENTAL ASSISTANT, an application requiring licensure according to the California License Handbook. However there is no evidence the Alien has this license and the employer does (sic) it as a requirement on the ETA 750A. In order for this petition to be found in compliance with regulation 20 CFR 656.20(C)(7), we need ... a] a copy of the alien's license and the employer amending the ETA 750A to include Dental Assistant license requirement, or b] a statement from the Committee on Dental Auxiliaries that the job described in box 13 does not require licensure.

The EDD then informed the Employer that

> The Alien has not submitted a certificate to show that he/she is a graduate of an approved Dental Assistant program. The Employer must amend the ETA 750A to include the Dental Assistant license requirements or a statement from the Committee on Dental Auxiliaries that the job described in Box 13 does not require licensure.

The Employer responded by submitting a copy of an excerpt from the EDD's Digest of Licensed Occupations. Under the Occupational Title of Dental Assistant, DOT (Dictionary of Occupational Titles) 079.361-018[3], the digest notes that practitioners must have graduated an approved Dental Assistant Program or have 18 months of training on-the-job with a Licensed Dentist. The excerpt further said that licensure is a voluntary process that permits a dental assistant to perform more complex procedures.

Notice of Findings. On September 30, 1993, the CO's Notice

[3]This is the DOT code assigned to the ETA 750A by the EDD.

of Findings (NOF) advised the Employer that certification would be denied on grounds that (1) the Employer failed to demonstrate that a current job opening exists as required by 20 CFR §656.30 and that (2) the Employer had not shown a good faith effort to recruit applicants.

(1) In regard to the failure to demonstrate that a current job opening exists under 20 CFR §656.30, the CO found that the Employer had not established that a state license was not required for this position. This finding could be rebutted by the Employer's submitting documentation of "a current, unfilled and lawful job opening,failed to demonstrate that a current job opening exists as required by 20 CFR §656.30," said the CO.

(2) In regard to the failure to recruit in good faith, the CO observed,

> Job Service Office sent resumes to you on January 21. Your effort to contact qualified applicant DeBorja did not take place until February 11. We note that you made no effort to contact her by telephone until she missed your first interview date (incidentally, applicant Cardenas reported to us that she did not have contact with you until March 1; her return receipt was signed February 10).

The Employer was thus informed that good faith recruitment required prompt efforts to contact applicants by both mail and telephone, and Employer was required to document such efforts by dated return receipts and telephone bills. The CO said this required rebuttal by evidence of his attempts to interview the U.S. applicants.

In response to the licensure issue, the Employer again submitted the above mentioned EDD publication together with copies of the California laws and regulations pertaining to "Dental Auxiliaries." The state regulation provides that several classes of persons may perform dental supportive procedures under the specified supervision of a licensed dentist. These classes include the position of "Dental assistant," who is defined as "an unlicensed person who may perform basic supportive dental procedures specified by these regulations under the supervision of a licensed dentist." Other classes Dental Auxiliaries, such as "Registered Dental Assistant" and "Registered Dental Assistant in Extended Functions" were also listed among the dental worker classes requiring a state license. The regulations listed the categories of work that can and can not be performed by a "Dental Assistant," the position named in the Employer's application. The prohibited activities included such functions as the taking of impressions for prosthodontia appliances and bridges and the

filling of root canals, inter alia.[4]

To establish his good faith efforts to recruit, the Employer submitted a statement from his receptionist, Marci Lejarde, who said that on January 26, 1993, Employer requested her to contact all eight applicants for the position by telephone and to set up interview appointments. She said that after numerous telephone calls, she could only reach one or two applicants and, pursuant to the Employer's further instructions, on February 9, 1993, she sent letters to the applicants by certified mail.

Second NOF. By the CO's second NOF of February 7, 1994, he again advised that certification would be denied on the same grounds and under the same regulations as were cited in the initial NOF, noting that the Employer had failed to submit the requested documentation and indicating that the Employer's arguments as to the California licensing requirements were not acceptable documentation. The Employer responded to the second NOF by submitting essentially the same documentation that he sent as his earlier rebuttal, indicating that it was impossible to get a statement from the Committee on Dental Auxiliaries and contending that the Committee referred all inquiries to the publications he had already sent in rebuttal.

Final Determination. The CO denied certification in his Final Determination of March 11, 1994, finding that the Employer's rebuttal "adds confusion" by responding with nothing more than the law and regulations regarding various dental auxiliary job titles without an providing an official opinion that would fit the job described in the ETA 750A application. Citing 20 CFR §656.20(c)(7), the CO concluded that the Employer had failed to submit evidence that his job offer is not contrary to any federal, State or local law, as stated in his application. The CO found further that the Employer failed to establish that the nine U. S. applicants had been contacted timely in that the Employer did not submit any telephone bills or other documentary evidence while noting that "most of the applicants were located in adjacent area codes." Employer then requested a review of the denial and the record was thereupon referred to the Board in this appeal.

DISCUSSION

Recruitment. Although the regulations do not explicitly state a "good faith" requirement in post-filing recruitment, a good faith requirement is implicit in the Act and regulations. **H.C. LaMarche Enterprises, Inc.** 87-INA-607 (Oct 27, 1988). Thus,

[4]Employer's rebuttal was accompanied by a statement that he had contacted the Committee on Dental Auxiliaries, which provided these state regulations.

an employer must make efforts to contact qualified applicants in a timely manner after receiving their resumes, and an employer's failure to do so is evidence of a failure to recruit in good faith. The Board has not established any hard and fast rule as to what constitutes an excessive amount of contact time, however. Other factors to be considered in this context include whether the job offering involves a professional position where the job applicants are assumed to expect a longer time to pass before employer contact. **Loma Linda Foods, Inc.**, 89-INA-289 (Nov. 26, 1991)(en banc). Initial contacts of three weeks or more were considered excessive in **Rancho Liquor**, 90-INA-520 (Dec. 3, 1991) (21 days), **Hydromach,**, 89-INA-329 (Aug. 15, 1990) (30 days), **Foster Electrical Service, Inc** 88-IA-284 (June 30, 1989)(over one month). Lesser periods were not considered excessive in **Lee & Chiu Design Group,** 88-INA-328 (Dec. 20, 1998)(en banc) (16-20 days), **Fair Weather Marine, Inc.**, 88-INA-331 (Sept. 21, 1989)(19 days), and **National Industries for the Severely Handicapped, Inc.**, 88-INA-388 (Feb. 13, 1990)(two to three weeks). The Board has held also that in some circumstances a good faith effort to recruit may require attempts to contact qualified applicants by both telephone and mail. **Diana Mock,** 88-INA-255 (Apr. 9, 1990). If the CO requests documentation of its efforts to contact qualified applicants, the employer must produce such evidence. **Gencorp,** 87-INA-659 (Jan. 13, 1988)(en banc). On the other hand, if the requested documentation is difficult or impossible to obtain, denial of certification is not appropriate when the employer submits sufficient evidence of a different character in response to the CO's request. **Engineering Measurement Co.,** 90-INA-171 (Mar. 29, 1991).

The applicant specifically identified by the CO in the instant case as not having been recruited in good faith is Ms. Taylor de Borja, whose resume was mailed to the Employer on Thursday, January 21, 1993. The assumption that the resume should have been received by the Employer after than January 22, 1993, would suggest that the lapse between the Employer's receipt of resume and the mailing of the appointment letter was 18 days. This is speculative, however, and cannot take the place of credible evidence of the facts that the Employer's burden of proof requires it to add to the record. In case the Employer seeks to prove its attempts to reach this U. S. applicant by telephone, and the CO is willing to accept a copy of Employer's telephone bill as proof. The telephone could not verify this contact, however, as the Employer and Ms. Taylor de Borja share the same area code. It follows that the statement by Employer's receptionist is the best evidence of Employer's attempt to reach her by telephone, and must be weighed in context. Since this Employer made other attempts to reach other applicants by telephone, it is inferred that the call to Ms. Taylor de Borja also occurred. It follows that, to the extent that it is relevant that the Employer attempted to contact Ms. Taylor de Borja, this is accepted as proven for the purposes of this case.

2. **Licensure.** 20 CFR § 656.20(c)(7) requires the Employer to show that its job opportunity's terms and conditions are not contrary to Federal, State or local law. The Board has held in this regard that labor certification is properly denied when an employer fails to establish that the alien has a license to perform the duties of the position offered or that the job is exempt from such a licensing requirement. **Perconal, Inc.,** 90-INA-108 (June 6, 1991). The procedure followed by the CO conformed to the holding in **Malihe Dardashti, M.D.,** 90-INA-110, where the Board required the Employer to obtain an opinion from a state board stating that the job of Medical Director did not require a license. In this case essence, the CO required the Employer to provide the same type of evidence, i.e., the opinion of the California Committee of Dental Auxiliaries that the job described in the ETA 750A does not require a license. Employer indicated that he did not comply because the Committee refused to issue such an opinion. The Employer was given the opportunity to prove this fact in his rebuttal, but did not document his assertions. While certification may not be denied because an employer has failed to submit evidence that it can not reasonably obtain, this Employer has failed to establish that he cannot reasonably obtain the particular documentation specified by the CO. Moreover, he has not offered credible evidence of this fact or of the fact that licensure is not required for this position by state or local laws governing the dental profession.

It is the general rule that an employer's representations are considered documentation for the purposes of the Act and regulations where the statements are reasonably specific and identify their bases. No such collateral evidence is offered by this Employer, and his attorney's opinion in the rebuttal has omitted to furnish any citation or other precedent or credible source lawful authority to support the inference suggested in his client's behalf. While the CO must consider such evidence, he must give it no more than the weight it rationally deserves. **Gencorp**, 87-INA-659 (Jan. 13, 1988), as cited in **Central Michigan Community Hospital**, 89-INA-116(Jan. 31, 1990).

In the context of this case it is appropriate to observe that certification is a privilege that the Act confers by giving favored treatment to specified foreign workers, whose skills Congress seeks to bring to the U. S. labor market to meet a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of this statutory privilege is clearly indicated in 20 CFR § 656.2(b), which quoted from § 291 of the Act (8 U. S. C. § 1361) the burden of proof that Congress has placed on certification applicants:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to

> establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

As this Employer seeks certification for the Alien under the Act as an exception to its broad limits on immigration into the United States, the award of certification is strictly construed pursuant to the principle that

> Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.

73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896)[5]. It follows that the Employer must present evidence that is commensurate with the favorable and advantageous treatment that he seeks in applying for special permission for this Alien to enter the United States lawfully and hold this position of permanent employment.

Conclusion. The CO has declined to credit the bare and unsupported statements of the Employer's lawyer as probative evidence of either the law or the practices of the California Committee of Dental Auxiliaries regarding the type of licensure, if any, that the law requires to perform the procedures for which the Employer seeks to recruit the U. S. workers or the Alien in this case. As there is sufficient evidence of record for the CO to have reached his conclusion, his finding should be affirmed under all of the facts of this case, having in mind the Employer's burden to prove that his entitlement to the relief he seeks under the Act and regulations.

Accordingly, the following order will enter.

ORDER

[5]In construing a tariff act, the Supreme Court there held that, "Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption," citing its previous decisions in **People v. Cook**, 148 U.S. 397, 13 SCt 645; and **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 301, 306, 14 SCt 592.

The Final Determination of the Certifying Officer denying alien certification under the Act and regulations is hereby affirmed.

For the Panel:

_____
FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95-INA-630

DR. PATRICIO A. TOLENTINO, Employer
MARIA C. PABLO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 29, 1997